In The

Supreme Court of the United States

October Term, 1978

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLE

No. 78-549

In the Matter of JOANNE H. PIERSMA, on behalf of KENNETH MAJORS,

Respondent,

against

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Petitioner.

In the Matter of ROBERT SMITH,

Respondent,

against

THE CHAIRMAN OF THE NEW YORK STATE BOARD OF PAROLE, and ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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REASONS FOR GRANTING THE WRIT

POINT I — Certiorari should be granted to review state judicial action which vacated parole detainer warrants when the parole violators were not denied due process rights. Under the facts of this case, the parole revocation hearings were not unconstitutionally delayed because the respondents were not entitled to a preliminary hearing under *Moody* v. *Daggett*, and in any event they waived the preliminary hearings. Further, they were not entitled to a prompt revocation hearing because they were each held under a new commitment as well as under the parole detainer warrant. 12

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners Robert J. Henderson, Superintendent, Auburn Correctional Facility, and The Chairman of the New York State Board of Parole respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals of the State of New York entered in these proceedings on July 6, 1978.

Opinions Below

The Opinion of the Court of Appeals on this joint decision is reported at 44 NY2d 982 and appears in the appendix hereto (p. A1). The opinions in the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, are reported: *Matter of Smith* v. *Chairman of N.Y. State Bd. of Parole*, 60 AD2d 775; 44 NY2d 982 and *Matter of Piersma* v. *Henderson*, 60 AD2d 1001; 44 NY2d 982 and appear in the Appendix hereto at page A-4 and A-8 respectively. The opinions in the Supreme Court, Cayuga County are unreported and appear in the appendix hereto.

Jurisdiction

The memorandum decision of the Court of Appeals of the State of New York sought to be reviewed was filed on July 6, 1978. This petition for certiorari has been filed within 90 days of that date. The jurisdiction of this Court to review the decision of the Court of Appeals by writ of certiorari is believed to be conferred by 28 USCA 1257(3) and Rule 19 of the Rules of this Court — Considerations Governing Review of Certiorari.

Questions Presented

1. Did the Court of Appeals erroneously vacate parole detainer warrants where the parole violators were not denied due process by an alleged delay in conducting parole revocation hearings because they had been arrested and held under commitments for crimes committed while on parole?

2. Did the Court of Appeals of the State of New York decide a Federal question of substance in a way probably not in accord with the applicable decision of this Court in *Moody* v. *Daggett* (429 U.S. 78 [1976]) so as to come within the provisions of Rule 19 of the Rules of this Court?

Constitutional and Statutory Provisions Involved

This case involves the first section of the Fourteenth Amendment of the Constitution of the United States which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

This case also involves the New York State Correction Law, §212, subd. 7, McKinney's Consolidated Laws of New York, Cumulative Annual Pocket Part (p. 77) which provides as follows:

> "§212. Parole and conditional release under indeterminate and reformatory sentences
>
> • • •
>
> "7. Whenever there is reasonable cause to believe that a person who is on parole or conditional release has violated the conditions thereof, the board of parole as soon as practicable shall declare such person to be delinquent. Thereafter, the board shall at the first available opportunity permit the alleged violator to appear personally, but not through counsel or others, before a panel of three members and explain the alleged violation. Such appearance shall be either at an institution under the jurisdiction of the state department of correction or at such other place as may be designated pursuant to rules and regulations of the board. The board shall within a reasonable time make a determination on any such declaration of delinquency either by dismissing the declaration or revoking the parole or conditional release. If the board dismisses the declaration, the in-

terruptions specified in subdivision three of section 70.40 of the penal law shall not apply, but the time spent in custody in any state or local correctional institution by a person who is on conditional release shall be credited against the term of his sentence in accordance with the rules specified in paragraph (c) of that subdivision." (McKinney's Consolidated Laws of New York.)

§70.40 Release on parole; conditional release

1. Indeterminate sentence.

(a) A person who is serving one or more than one indeterminate sentence of imprisonment may be paroled from the institution in which he is confined at any time after the expiration of the minimum period or periods of imprisonment that have been fixed. Release on parole shall be in the discretion of the state board of parole, and such person shall continue service of his sentence or sentences while on parole, in accordance with the subject to the provisions of the correction law.

(b) A person who is serving one or more than one indeterminate sentence of imprisonment shall, if he so requests, be conditionally released from the institution in which he is confined when the total good behavior time allowed to him, pursuant to the provisions of the correction law, is equal to the unserved portion of his maximum or aggregate maximum term. The conditions of release shall be such as may be imposed by the state board of parole in accordance with the provisions of the correction law.

Every person so released shall be under the supervision of the state board of parole for a period equal to the unserved portion of the maximum or aggregate maximum term.

2. Definite sentence. A person who is serving one or more than one definite sentence of imprisonment with a term or aggregate term in excess of ninety days may, if he so requests be conditionally released from the institution in which he is confined at any time after service of sixty days of that term, exclusive of credits allowed under

subdivisions four and six of section 70.30. In computing service of sixty days, the credit allowed for jail time under subdivision three of section 70.30 shall be calculated as time served. Conditional release from such institution shall be in the discretion of the parole board, and shall be upon such conditions as may be imposed by that board, in accordance with the provisions of the correction law.

Conditional release shall interrupt service of the sentence or sentences and the remaining portion of the term or aggregate term shall be held in abeyance. Every person so released shall be under the supervision of the parole board for a period of one year. Compliance with the conditions of release during the period of supervision shall satisfy the portion of the term or aggregate term that has been held in abeyance.

3. Delinquency.

(a) When a person has violated the terms of his parole and the state board of parole has declared such person to be delinquent, the declaration of delinquency shall interrupt the person's sentence as of the date of the delinquency and such interruption shall continue until the return of the person to an institution under the jurisdiction of the state department of correction.

(b) When a person has violated the terms of his conditional release and has been declared delinquent by the board or commission having supervision over him, the declaration of delinquency shall interrupt the period of supervision as of the date of the delinquency and such interruption shall continue until the return of the person to the institution from which he was released or, if he was released from an institution under the jurisdiction of the state department of correction, to an institution under the jurisdiction of that department, Upon such return, the person shall resume service of his sentence.

(c) Any time spent by a person in custody from the time of delinquency to the time service of the sentence resumes

shall be credited against the term or maximum term of the interrupted sentence, provided:

> (1) That such custody was due to an arrest or surrender based upon the delinquency; or
>
> (ii) that such custody arose from an arrest on another charge which culminated in a dismissal or an acquittal; or
>
> (iii) that such custody arose from an arrest on another charge which culminated in a conviction, but in such case, if a sentence of imprisonment was imposed, the credit allowed shall be limited to the portion of the time spent in custody that exceeds the period, term or maximum term of imprisonment imposed for such conviction.

Statement of the Case

The respondents were serving sentences for crimes committed while on parole but had not received parole revocation hearings for some period of time after their arrests and subsequent commitment. The Court of Appeals affirmed the decisions of the Appellate Division, Fourth Department, which voided the inmates' parole detainer warrants holding that they were denied due process in that they did not receive prompt parole revocation hearings. The crimes which were committed while on parole were among the parole violations charged.

In the *Smith* case the alleged denial of due process claim first appeared in the petition of Robert Smith who claimed he was prejudiced because he was denied a parole revocation hearing. This federal question was decided in the decision of Supreme Court, Cayuga County which held in pertinent part "* * * that he never received a parole revocation hearing and the due process rights of the petitioner having been abridged and therefore although petitioner is not entitled to the vacature of

the parole violation warrant #503 44 he is entitled to a parole revocation hearing * * * *." Both the majority and dissenting opinions in the decision of the Appellate Division, Fourth Department discussed the denial of constitutional rights of the petitioner.

In the *Piersma on Behalf of Majors* case, the federal questions sought to be reviewed first appeared in the petition which claimed, "* * * federal constitutional rights have been violated by the failure of the respondent to provide relator with a prompt final revocation hearing." The decision of the Supreme Court, Cayuga County discussed the parole violators' constitutional claim and concluded that he was "not prejudiced". The decision of the Appellate Division, Fourth Department held, "A delay of more than 41 months on granting petitioner his final parole revocation hearing is prejudicial and a denial of his constitutional rights." The decision of the Court of Appeals in effect raised the federal question when it decided contrary to the *Moody* decision.

Facts

A. *Smith Case*

On December 10, 1965, the respondent Smith was sentenced in Suffolk County Court to a term of 10 to 15 years for burglary, first degree. On August 14, 1972, he was paroled.

On January 24, 1976, the respondent Smith was arrested for burglary. He was declared delinquent as of January 24, 1976 by Parole Commissioner Caldwell. On January 28, 1976, a parole violation warrant was lodged at the Suffolk County Jail. On January 28, 1976, the respondent waived his right to a preliminary parole violation hearing. One of the charges of parole violation was, "In violation of Parole Rule #4 you failed to

lead a law-abiding life and conduct yourself as a good citizen in that on 1/24/76 you burglarized a home".

On May 12, 1976 the respondent Smith pled guilty to attempted burglary, third degree, and was sentenced to a concurrent 2 to 4 year term by Suffolk County Court.

On May 14, 1976, he was returned to Ossining Correctional Facility. He received credit for prior time served on his first sentence against his new minimum so he became eligible for parole. On August 17, 1976, he appeared for a parole consideration hearing but was held 3 months or earlier for completion of records. On September 14, 1976, the respondent was given a parole consideration hearing at Auburn Correctional Facility. Parole was denied because of his intervening conviction. He was held for 24 months to appear before the September 1978 board meeting. On August 16, 1978 he was approved for release by September 13, 1978 if he could set up a program and get a job. On September 28, 1978 he was still confined at Wallkill Correctional Facility. He is to reappear before the February 1979 Board meeting.

By petition, verified November 24, 1976, the respondent Smith sought a writ of habeas corpus claiming "not only did the deprivation of a Revocation Hearing contravene petitioner's Due Process rights, but also served to chill the petitioner's right to bail as provided by the 6th Amendment".

By judgment dated May 20, 1977, the Supreme Court, Cayuga County, held that the respondent Smith was not entitled to vacature of the parole violation warrant but that he was entitled to a parole revocation hearing. He appealed to the Appellate Division, Fourth Department, on June 2, 1977 from the decision of Supreme Court, Cayuga County, entered May 23, 1977.

Meanwhile in June 1977, the respondent Smith was given a parole revocation hearing and his parole was revoked. The computation in the record shows that the new sentence expires

January 21, 1980. The old sentence expires March 28, 1981 and respondent has a tentative conditional release date of August 13, 1979.

By order entered December 16, 1977, the Appellate Division, with a dissenting opinion which held that he was not prejudiced by the delay in the revocation hearing, ordered, "That the judgment so appealed from be, and the same hereby is reversed and the petition is granted to the extent of dismissing the parole detainer warrant".

The appellants served a notice of appeal to the Court of Appeals, dated January 27, 1978, pursuant to New York Civil Practice Law and Rules CPLR, § 5601 (a)(ii).

On July 6, 1978 the Court of Appeals affirmed the decision of the Appellate Division, with a memorandum opinion which is attached to this petition.

B. *Piersma on Behalf of Majors Case*

The respondent Majors was sentenced in Lewis County Court on May 1, 1947 to a term of 20 to 40 years for Arson, first degree. He was received at Attica Correctional Facility on this sentence on May 2, 1947, paroled on February 26, 1963, declared delinquent June 14, 1963 and returned to Auburn Correctional Facility on February 14, 1964. He was re-paroled on October 14, 1971 and declared delinquent on March 23, 1974.

On March 26, 1974 the respondent Majors was arrested by the Syracuse, New York Police Department on a Sex Abuse charge. The parole violation warrant was filed with the Syracuse Police Department on March 27, 1974. He was charged with parole violations of drinking alcoholic beverages in excess and failing to conduct himself as a good citizen on May 23, 1974 in that he was involved in sexual misconduct with two minor male children. The respondent Majors waived a preliminary role violation hearing on March 27, 1974.

He pled guilty to Sex Abuse, first degree on February 13, 1975 and was sentenced on that date in Onondaga County Court to a term of 2 to 4 years concurrent with his original sentence for Arson, first degree. He was returned to Attica on February 14, 1975.

Because of prior time served on the respondent Majors' original sentence, the 2 year minimum on his 2 to 4 year term for Sex Abuse was satisfied. On June 10, 1974, he had a parole consideration hearing on this charge and it was the decision of the Parole Board to hold him 2 years to the June 1977 Board with a Psychiatric Report.

He was transferred to Auburn Correctional Facility on September 9, 1976. On June 15, 1976 He had another parole consideration hearing at Auburn; parole was denied and he was held to the June 1977 Board. The reasons for denial were "Because of the serious nature of your offense, Sexual Abuse 1st degree which involved young children and history of prior sexual abuse activity, your release is incompatible with the welfare of society."

On September 13, 1977 the respondent Majors had a parole revocation hearing on the original sentence for Arson, first degree. The parole violation was sustained and parole was revoked.

The maximum expiration date on the Sex Abuse sentence was March 19, 1978. However, the maximum expiration date on the Arson term is September 29, 1988 and that is the controlling sentence under New York law.

By petition, verified October 4, 1977, Joanne Piersma, counsel to respondent, sought a writ of habeas corpus requesting that, "this Court order the relator to be restored to parole on his 1947 conviction forthwith" because of an alleged failure to provide the respondent with a prompt final revocation hearing.

Supreme Court, Cayuga County, denied the petition without a hearing by judgment entered October 24, 1977. The petitioner appealed to the Appellate Division, Fourth Department.

By order entered January 20, 1978 the Appellate Division ordered, "That the judgment so appealed from be, and the same hereby is unanimously reversed and the petition is granted to the extent of dismissing the parole detainer warrant".

The appellant served a notice of appeal to the New York Court of Appeals, dated February 14, 1978, pursuant to New York Civil Practice Law and Rules, § 5601(a)(ii).

On July 6, 1978 the Court of Appeals affirmed the decision of the Appellate Division, with a memorandum opinion which held that the parole detainer warrants were properly dismissed because of the delay in granting the revocation hearings.

REASONS FOR GRANTING THE WRIT

POINT I

Certiorari should be granted to review state judicial action which vacated parole detainer warrants when the parole violators were not denied due process rights. Under the facts of this case, the parole revocation hearings were not unconstitutionally delayed because the respondents were not entitled to a preliminary hearing under *Moody* v. *Daggett*, and in any event they waived the preliminary hearings. Further, they were not entitled to a prompt revocation hearing because they were each held under a new commitment as well as under the parole detainer warrant.

The respondents were not denied due process by the alleged delay in receiving a parole revocation hearing because this Court in *Moody* v. *Daggett* (429 U.S. 78 [1976]) has interpreted its decision in *Morrissey* (408 U.S. 471 [1972]) as not requiring a prompt parole revocation hearing while a parolee is serving a sentence on a new commitment for a crime committed while on parole.

It is the petitioner's contention that *Moody* v. *Daggett (supra)* provides a basis for granting certiorari. In that case, this Court held that Moody could be required to wait until the expiration of two ten-year concurrent sentences for crimes committed while on parole before receiving a final parole revocation hearing, and further, that because Moody was convicted of and incarcerated on a subsequent offense there was no need for preliminary parole revocation hearing which *Morrissey* requires upon arrest for parole violation.

This Court said in pertinent part in *Moody* (429 U.S., pp. 85-88):

> "Petitioner asserts protected liberty interests in both the length and conditions of his confinement. Those interests, he argues, are disregarded in several respects

by issuance against him of an unexecuted parole violator warrant, which bars him from serving his 1966 rape conviction sentence concurrently with his 1971 homicide sentences, retards his parole eligibility on the later convictions and adversely affects his prison classification status. He argues that lack of a prompt hearing risks the loss of evidence in mitigation which might induce the Board not to revoke his parole. Respondent's position is that whatever process may eventually be due petitioner, the mere issuance of a parole violator warrant works no present deprivation of protected liberty sufficient to invoke due process protection.

"In *Morrissey*, we held that the conditional freedom of a parolee generated by statute is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment which may not be terminated absent appropriate due process safeguards. The revocation hearing mandated by *Morrissey* is bottomed on the parallel interests of society and the parolee in establishing whether a parole violation has occurred and, if so, whether under all the circumstances the quality of that violation calls for parole revocation. *The issue before us here, however, is not whether a Morrissey-type hearing will ever be constitutionally required in the present case, but whether a hearing must be held at the present time, before the parolee is taken into custody as a parole violator. We hold that there is no requirement for an immediate hearing.*

"Petitioner's present confinement and consequent liberty loss derives not in any sense from the outstanding parole violator warrant, but from his two 1971 homicide convictions. Issuance of the warrant and notice of that fact to the institution of confinement did no more than express the Board's intent to defer consideration of parole revocation to a later time. Though the gravity of petitioner's subsequent crimes places him under a cloud, issuance of the warrant was not a determination that petitioner's parole under his 1966 rape conviction will be revoked; the time at which the Commission must make that decision has not yet arrived. With only a prospect of future incarceration which is far from certain, we cannot

say that the parole violator warrant has any present or inevitable effect upon the liberty interests which *Morrissey* sought to protect. Indeed, in holding that '[t]he revocation hearing must be tendered within a reasonable time after the parolee is taken into custody [,]' *Morrissey, supra*, at 488, we established execution of the warrant and custody under that warrant as the operative event triggering any loss of liberty attendant upon parole revocation. This is a functional designation, for *the loss of liberty as a parole violator does not occur until the parolee is taken into custody under the warrant.* Cf. 18 U. S. C. § 4206 (1970 ed.); 18 U. S. C. § 4213(d).

"The other injuries petitioner claims to suffer either do not involve a loss of protected liberty or have not occurred by reason of the warrant and detainer. His real complaint is that he desires to serve his sentence for the 1966 rape conviction concurrently with his sentences for two 1971 homicides. But as we have noted, even after completion of the homicide sentences the Commission retains full discretion to dismiss the warrant or decide, after hearing, that petitioner's parole need not be revoked. If revocation is chosen, the Commission has power to grant, retroactively, the equivalent of concurrent sentences and to provide for unconditional or conditional release upon completion of the subsequent sentence. See 18 U. S. C. §§ 4211, 4214(d); 28 CFR §§ 2.21, 2.52(c) (2). Thus, deferral of the revocation decision does not deprive petitioner of any such opportunity [sic]; nothing in the statute or regulations gives him any 'right' to force the decision of the Commission at this time." (Emphasis supplied.)

This Court held in *Moody* that the Federal Parole Commission could constitutionally defer the execution of the Federal parole detainer warrant and the resultant taking of custody until Moody finished his intervening sentence.

Further, this Court in effect there also held that due process was satisfied if Moody received his final parole revocation hearing within ninety days following the execution of the warrant and the taking of custody even if this occurred ten

years after he commenced his intervening sentence. This Court said in Footnote 8 to the opinion (p. 86):

> "At the hearing the parolee may present evidence addressed to whether, given his admitted violation, circumstances exist justifying his continued release on parole. 28 CFR § 2.50. Petitioner will be entitled to this statutory hearing within 90 days after execution of the warrant. 18 U.S.C. § 4214(c)."

The New York State Board of Parole has a similar statutory discretion to that of the Federal Parole Commission in that after a revocation hearing it may dismiss the declaration of delinquency and give the parolee credit for the time from the date of declaration of delinquency until he is returned to a State correctional facility. New York Correction Law § 212, subd. 7, provides in pertinent part, "If the board dismisses the declaration, the interruptions specified in subdivision three of section 70.40 of the penal law shall not apply * * *."

By these standards, the respondents' final parole revocations were not delayed. The alleged sixteen month lapse of time in the *Smith* case and forty-one month lapse of time in the *Piersma* case are considerably less than the ten-year lapse of time which this Court sanctioned in the *Moody* case.

In *Matter of Dubay* v. *LeFevre* (60 A D 2d 263 [3d Dept., 1977]), the petitioner there was in the same position as the instant respondents. He was serving a new sentence for conviction of a crime committed while on parole and he sought vacatur of a parole violation warrant and restoration to his prior parole status upon reaching eligibility for release from prison on the subsequent conviction. The Appellate Division of the New York Supreme Court affirmed the Special Term which had held that the petitioner was entitled to a prompt parole revocation hearing but not to a vacatur of the warrant. The Appellate Division held that while a final parole revocation hearing had to be held before the service of the parole violator's new sentence

was complete it did not have to be held at any particular time prior thereto as no violation of the inmate's rights had been shown. An opinion written by Mr. Justice HERLIHY relied in part on *Moody* (pp. 267-268):

> "'In the *Moody* case it was observed by Mr. Chief Justice BURGER in the majority opinion (p. 89): "Finally, there is a practical aspect to consider, for in cases such as this, in which the parolee admits or has been convicted of an offense plainly constituting a parole violation, the only remaining inquiry is whether continued release is justified notwithstanding the violation * * *. Forcing decision immediately after imprisonment would not only deprive the parole authority of this vital information [a parolee's subsequent institutional record], but since the other most salient factor would be the parolee's recent convictions * * * a decision to revoke parole would often be foreordained. Given the predictive nature of the [parole revocation] hearing, it is appropriate that such hearing be held at the time at which prediction is both most relevant and most accurate — at the expiration of the parolee's intervening sentence."'"

So too, in the instant appeal it would have been to the respondents' advantage, rather than to their detriment to have their parole revocation hearings at or near the end of their new sentences. If the inmate has a good institutional record he might be able to overcome the adverse impression created on the Parole Board by the conviction of a crime committed while on parole, which resulted in the revocation of his parole.

The respondents were not entitled to a preliminary parole revocation hearing because they were convicted and incarcerated on a subsequent offense. In *Moody*, this Court said (p. 86):

> "In the present case, where petitioner has already been convicted of and incarcerated on a subsequent offense, there is no need for the preliminary hearing which *Morrissey* requires upon arrest for a parole violation. This is so both because the subsequent conviction obviously gives the parole authority 'probable cause or reasonable ground to believe that the ... parolee has committed acts that would constitute a violation of parole conditions,' 408 U.S., at 485, and because issuance of the warrant does not immediately deprive the parolee of liberty. The 1976 Act calls for no preliminary hearing in such cases. 18 U. S. C. A. § 4214(b) (1) (June 1976 Supp.); see CFR § 2.48(f) (1976)."

On January 24, 1976 the respondent Smith was arrested on a burglary charge. On January 28, 1976 a violation warrant was lodged at the Suffolk County Jail, which was partially based on the new offense. The respondent Smith waived his right to a preliminary parole revocation hearing on January 28, 1976. In view of this there was no prejudice to the respondent during the period leading up to his incarceration for the crime committed while on parole.

The respondent Smith was returned to Ossining on May 14, 1976. He appeared for a parole eligibility hearing on August 17, 1976 which was adjourned for completion of records. On September 14, 1976, he was given a parole eligibility hearing at Auburn. Parole was denied because of his intervening conviction.

On March 26, 1974, the respondent Majors was arrested on a sex abuse charge by the Syracuse Police Department. A parole violation warrant was filed with the Syracuse Police Department on March 27, 1974, which was partially based on the new offense. The repondent Majors waived his right to a preliminary parole revocation hearing on March 27, 1974. In view of this there was no prejudice to the respondent Majors during the period leading up to his incarceration for the crime committed while on parole.

The respondent Majors was returned to Attica on February 14, 1975 and was given a parole eligibility hearing on June 10, 1975.

In a similar case, *People ex rel. Schmidt* v. *La Vallee* (39 N.Y. 2d 886 [1976]), the New York Court of Appeals held that since the inmate had received a parole eligibility hearing it was academic that he did not receive a prompt revocation hearing. In dismissing the appeal for mootness, the Court said:

> "Since relator has received a parole eligibility hearing it is now academic that he did not receive, as he should have, a prompt final parole revocation hearing (see *Matter of Beattie* v. *N.Y.S. Board of Parole*, ____ NY2d ____ , decided 4-27-76). Hence, the appeal is dismissed as moot."

In *Shelton* v. *Taylor* (550 F. 2d 98 [2d Cir., 1977]), a post-*Moody* decision, the United States Court of Appeals affirmed the denial of a petition, which claimed a prejudice arising from failure to afford the petitioner in that case a Federal parole revocation hearing until after he had completed his State sentence for a State offense. In holding that the delay allegation was too "speculative" to grant relief, the Court of Appeals in *Shelton* recognized the proposition enunciated by the New York Court of Appeals in *Schmidt* that any prejudice from the denial of a prompt parole revocation hearing is nullified when the parolee is given a parole eligibility hearing because he can possibly explain his parole violation at that time, saying (p. 101):

> "In rejecting Moody's argument that the issuance of a parole violator warrant could unfairly prejudice his chances for parole on his intervening sentence, the Court relied on the fact that Moody would have the same opportunity to address the Parole Commission in his parole eligibility hearing as he would have had in a parole revocation hearing."

Therefore, the appellants here did not prejudice the respondents but, to the contrary, offered preliminary parole revocation hearings four days after Smith's arrest and one day after Majors' arrest, and gave a parole consideration hearing to both respondents, which is the due process equivalent of a parole

revocation hearing, a few months after their return to the correctional facility. In addition, each was also given a final revocation hearing.

In *Shepard* v. *United States Board of Parole* (541 F. 2d 322 [2d Cir., 1976], judgment vacated 429 U.S. 1057), decided September 7, 1976, two months before the decision of this Court in *Moody* v. *Daggett* on November 15, 1976, the United States Court of Appeals reversed an order of the United States District Court for the Northern District of New York, JAMES T. FOLEY, Chief Judge, which denied a petition. Shepard was a Federal parolee who was convicted of a crime and was serving a sentence in a New York State correctional facility. A Federal parole detainer warrant was filed based upon his State conviction. The petitioner claimed a right to a prompt parole revocation hearing. The Court of Appeals held that due process entitled Shepard to a review by the Parole Commission of the detainer within 180 days of notification to the Commission of placement. Further, the Court of Appeals held that the existence of the detainer denied Shepard due process ((pp. 325, 326), because "he has been denied valuable privileges generally available to inmates including participation in educational and temporary release programs • • •" and that "• • • a pending parole violation can delay an inmate parole from his intervening term of imprisonment" constituting a "grievous loss". The Court of Appeals also held (p. 326), "Moreover, Shepard has an interest in obtaining the Board's consideration of evidence allegedly mitigating the charges underlying his parole violation warrant before the evidence is significantly impaired by the passage of time" and "Finally, the parolee has a definite, personal interest in being relieved of uncertainty as to what his future will be • • •"

This Court reversed the decision of the Court of Appeals in *Shepard* and held, in *United States Parole Commission* v. *Shepard* (429 U.S. 1057 [1977]), "Judgment vacated and case remanded to the Court of Appeals for further consideration in

light of Moody v. Daggett, 429 U.S. 78, 50 L. Ed. 2d 236, 97 SC 274 (1976) and to consider whether the case is moot."

In *Shelton* v. *Taylor (supra)*, which was decided three months after *Moody*, the Court of Appeals took an opposite position from its previous decision in *Shepard* and affirmed the dismissal of a petition on the ground that the alleged prejudice resulting from failure to afford petitioner a Federal parole revocation hearing for four years and until after he had completed his State prison term, did not deny due process (p. 103):

> "In Shelton's case, however, we need not decide whether indirect effects on eligibility for state parole or education release should trigger the right to due process at an earlier stage than that specified in *Moody*. It would be unreasonable for the court now to order the New Jersey authorities to reconsider Shelton's case. Nor would a quid pro quo reduction of Shelton's remaining sentence be justified; the prejudice alleged is too remote and speculative, particularly since the likely outcome of any earlier revocation hearing would have been to let the federal detainer stand until the end of Shelton's state imprisonment. Accordingly, Shelton has no present claim for relief."

Similarly, in the instant case, where the Parole Board elected to hold the respondents at their parole consideration hearings and to sustain the violation of parole at the parole revocation hearings, the respondents have not shown that the result would have been any different if their parole revocation hearings were held at an earlier date.

Federal Courts have followed *Moody* and have held that since the Parole Board is given statutory discretion, no liberty interest is created which would constitutionally entitle a parolee imprisoned for a crime committed while on parole to a due process right to a prompt parole revocation hearing when a parole violation warrant was lodged at his place of confinement. (See, *Larson* v. *McKenzie*, 554 F. 2d [4th Cir., 1977], involving an

eighteen-month delay in granting parole revocation hearing after intervening sentence; *Sanchez* v. *Riggsby*, 556 F. 2d 1310 [5th Cir., 1977], involving a twenty-five month delay in granting parole revocation hearing after issuance of the warrant; *United States ex rel. Hahn* v. *Revis*, 560 F. 2d 264, 265 [7th Cir., 1977], where there was a three-year delay in a parole hearing and it was held that Federal parolee did not suffer a liberty loss until after the expiration of both the new State sentence and the later old State sentence; *Head* v. *United States Board of Parole*, 553 F. 2d 22 [7th Cir., 1977], where it was held that the *Moody* v. *Daggett* ruling on timing of parole revocation hearings is applicable to detainers placed against State as well as Federal prisoners.)

Under the facts of this case, the Parole Board "within a reasonable time" made determinations on the declarations of delinquency at the parole revocation hearings and revoked parole (N.Y. Correction Law, § 212[7]). Since there was no violation of statute by the Parole Board, its revocation of respondents' parole was a judicial function and not reviewable (Correction Law, § 212[10]; *Matter of Hines* v. *State Board of Parole*, 293 N Y 2d 254, 257). Therefore, the decision of the Court below vacating the parole detainer warrant is an interference with the statutory discretion of the Parole Board (*Matter of Speed* v. *Regan*, 42 N Y 2d 1085 [1977]).

Under the facts of this case the parole violators were not denied due process by failing to receive prompt parole revocation hearings. Their confinement was not a result of the parole violation detainer but because of their conviction and commitment for crimes committed while on parole.

POINT II

This Court should review the decision of the New York State Court of Appeals because its decision is not in accord with this Court's decision in *Morrissey* v. *Brewer*.

The basis for this petition for certiorari is Supreme Court Rule 19(a) that the State Court "has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

The Court of Appeals held on July 6, 1978:

> "The order of the Appellate Division should be affirmed, without costs, in each case.
>
> "The parole detainer warrants were properly dismissed (*People ex rel. Walsh* v. *Vincent*, 40 NY2d 1049; *Matter of Beattie* v. *New York State Bd. of Parole*, 39 NY2d 445.) It is of no significance for present purposes that the parolees in these cases were being held on new commitments rather than only on new arrest charges.
>
> "Chief Judge Breitel and Judges Gabrielli, Jones, Wachtler and Fuchsberg concur in memorandum: Judges Jasen and Cooke concur on constraint of *People ex rel. Walsh* v. *Vincent* (40 NY2d 1049)."

The bare minimal decision of the Court of Appeals did not address the constitutional question but merely relied upon two prior Court of Appeals decisions in the *Walsh* and *Beattie* cases. However, the constitutional question and the two conflicting Supreme Court decisions in the *Morrissey* and *Moody* cases were interpreted in the majority and dissenting opinions of the Appellate Division, Fourth Department in the instant cases.

The majority decision of the Appellate Division, Fourth Department, held that Smith's constitutional rights were violated by the delay in his parole revocation hearing when it said (60 AD2d, p. 776):

> "However, where a new sentence had been served and petitioner's confinement is solely under an old sentence for which he had not received a prompt parole revocation hearing, he is entitled to be restored to parole (*People ex rel. Walsh* v. *Vincent*, 40 NY2d 1049; *Matter of Grix* v. *Regan*, 57 AD2d 710; *People ex rel. Royster* v. *Bombard*, 55 AD2d 940). In the instant case, the nearly 17-month delay in granting petitioner his final parole revocation hearing is plainly prejudicial and a denial of his constitutional rights (*Morrissey* v. *Brewer*, 408 US 471; *Matter of Wright* v. *Regan*, 46 AD2d 163). In this connection the dissent in voting to affirm relies, in part, on *Moody* v. *Daggett* (429 US 78). We note, however, that in a case decided subsequent to *Moody* v. *Daggett*, New York's highest court, nonetheless, requires a prompt final parole revocation hearing even though the violation of parole and resulting detention may have involved the commission of another crime (see *People ex rel. Walsh* v. *Vincent*, 40 NY2d 1049, *supra*; *Matter of Beattie* v. *New York State Bd. of Parole*, 39 NY2d 445). While petitioner's new sentence has not been fully served, it will terminate 13 months prior to the expiration of the old 1965 sentence. Hence, petitioner's continued incarceration, after his new shorter sentence ends, will be under the controlling old sentence for which he was not afforded a prompt parole revocation hearing. Accordingly, petitioner is entitled to have the parole detainer warrant dismissed with prejudice so that upon the expiration of his new sentence he will be entitled to be released to parole status."

The dissenting opinion relied upon a later Supreme Court decision in *Moody* v. *Daggett*, *supra*, where this Court held that Moody was not entitled a parole revocation hearing until he had completed service of the 10-year sentence for a crime committed while on parole, which was the basis for the parole violation. This severely limited the *Morrissey* decision which held that a parole violator is entitled to a preliminary parole violation hearing as soon as possible after arrest and a final parole revocation hearing about two months later.

The dissenting opinion in *Smith* cited the *Moody* case to show a lack of prejudice to Smith from a delay in the parole revocation hearing because Smith was serving a new sentence for a new crime, when it said (60 AD2d, pp. 776-777):

> "The question presented is whether a delay in affording a parole revocation hearing has deprived petitioner of his constitutional rights to due process under *Morrissey* v. *Brewer* (408 US 471) when such delay has resulted neither in incarceration which might not otherwise have been imposed upon the petitioner nor in the unavailability of witnesses or other sources of evidence. I see no reason why petitioner's rights to due process have been impaired, inasmuch as the revocation hearing on the old sentence has been held and the minimum period of his more recent sentence will not expire until May 12, 1978, Until that minimum has expired, petitioner would not be eligible to be released on parole under his new sentence. No prejudice from the delay in holding the parole revocation hearing has been shown, since his incarceration at least until May 12, 1978 derives not in any sense from the delay in granting the parole revocation hearing, but from the arrest and conviction on the new charges (see *Moody* v. *Daggett*, 429 US 78, 86). Indeed it appears that the only basis for the parole revocation under the old sentence was the conviction for which he received the new sentence. The proof of this conviction was a matter of record and was uncontroverted. Under these circumstances, a prompt revocation hearing is not mandated (see *Moody* v. *Daggett*, supra; * * *)."

The unanimous decision in the companion case *Piersma on behalf of Majors* was based on the *Smith* case (p. 1002):

> "Petitioner has been incarcerated since his arrest in March, 1974. He was not afforded a parole revocation hearing until October 13, 1977. A delay of more than 41 months in granting petitioner his final parole revocation hearing is prejudicial and a denial of his constitutional rights (*Morrissey* v. *Brewer*, 408 US 471). In such circumstances the parole detainer warrant must be dismissed with prejudice and upon the expiration of the sentence imposed on February 13, 1975 he will be entitled to be released to parole status (*Matter of Smith* v. *New York State Bd. of Parole*, 60 AD2d 775)."

Therefore, these Appellate Division decisions held there was a denial of due process in that the prompt revocation hearing requirements of the *Morrissey* decision were not met.

In *Beattie* v. *Board of Parole* (39 NY2d 445 [1976]) a pre-*Moody* decision the Court of Appeals held that a parolee held on an unrelated (to his original conviction) criminal charge in a local jail is entitled to a prompt final parole revocation hearing. The Court also held that the Parole Board has jurisdiction because a local jail is a place "subject to the convenience and practical control of the Parole Board". The Court also held that the parole violator has established a basis for prejudice, because it would have been futile to post bail because the parole detainer warrant would prevent his freedom on bail.

The majority in *People ex rel. Walsh* v. *Vincent* (40 NY2d 1049 [1976]) did not discuss any constitutional questions; it merely quoted the *Beattie* case and held that an inmate in a local jail is still entitled to a prompt parole revocation hearing because a jail is subject to the convenience of the Parole Board and also warned the Parole Board to give prompt hearings.

The decision of the New York Court of Appeals, which is the subject of this petition, did not directly discuss the constitutional question but was entirely based upon its prior decisions in the *Walsh* and *Beattie* cases. It also dismissed the appellants' argument based upon the Supreme Court decision in *Moody*, which attempted to distinguish *Walsh* and *Beattie* from *Smith* and *Piersma* because *Walsh* and *Beattie* unlike *Smith* and *Majors* were not held on new commitments which would prevent parole release on parole. Therefore, Walsh and Beattie were presumably prejudiced by the delay in receiving their parole revocation hearings. Conversely, the appellants argued that

Smith and Majors were not prejudiced by the delay in giving them a parole revocation hearing because they were held by a new commitment for the conviction of the crime on parole in addition to the parole detainer warrant on the original sentence. Therefore, even if their revocation was lifted they would still have to serve their new sentence. Also the Court of Appeals held that Walsh and Beattie were prejudiced because they were deprived of bail by the parole detainer warrants on their arrests for crimes committed while on parole. Conversely, Smith and Majors could not get bail because of their commitments on their new sentences would prevent them from obtaining bail and the serious nature of the new charges.

The appellants' briefs submitted to the New York Court of Appeals explained the delay period in giving the parole revocation hearing from the time of arrest until the time of commitment to State prison by showing that both Smith and Majors agreed to waive their preliminary parole revocation hearings. Also, the briefs argued that after commitment any delay would be excusable under the *Moody* theory that the hearing could be delayed until the new sentence is served.

The decisions of the New York courts in the instant cases are not in accord with this Court's decisions in *Morrissey* and there is continous litigation on this subject. There are several other cases pending in the Appellate Division of the New York Supreme Court and one in the New York Court of Appeals, where delay is alleged in granting parole revocation hearings.

CONCLUSION

Petitioners pray that this Court should grant certiorari to review these cases in the light of this Court's decision in *Moody* v. *Daggett*.

Dated: October 3, 1978

Respectfully submitted,

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APPENDIX

APPENDIX A

Decision of the Court of Appeals, State of New York

In the Matter of JOANNE H. PIERSMA, on Behalf of KENNETH MAJORS, Respondent, v ROBERT J. HENDERSON, as Superintendent of the Auburn Correctional Facility, Appellant.

In the Matter of ROBERT SMITH, Respondent, v CHAIRMAN OF THE NEW YORK STATE BOARD OF PAROLE et al., Appellants.

Argued June 8, 1978; decided July 6, 1978

SUMMARY

APPEALS (1) in the first above-entitled proceeding, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered January 20, 1978, which (a) reversed a judgment of the Supreme Court at Special Term (JOSEPH J. RYBARCZYK, J.), entered in Cayuga County, dismissing a habeas corpus proceeding, and (b) having converted the proceeding into an article 78 proceeding, granted the petition to the extent of dismissing the parole detainer warrant lodged against Kenneth Majors, and (2) in the second above-entitled proceeding, from an order of said Appellate Division, entered December 16, 1977, which (a) reversed a judgment of the Supreme Court at Special Term (DANIEL A. DE PASQUALE, J.), entered in Cayuga County, which, in a habeas corpus proceeding treated as an article 78 proceeding, directed the Parole Board to hold a parole revocation hearing for petitioner Robert Smith within 60 days, and (b) granted the petition to the extent of dismissing the parole detainer warrant lodged against petitioner. Majors had been sentenced in May, 1947 to a term of 20 to 40 years upon an arson conviction; he was released on parole in October, 1971; in March, 1974, he was arrested and

charged with sexual abuse, and a parole detainer warrant was lodged against him; in February, 1975 he was sentenced, upon a plea of guilty to sexual abuse, to a term of two to four years, to run concurrently with his 1947 sentence, and, in September, 1977, he was afforded a final parole revocation hearing. Smith had been sentenced in December, 1965 to a term of 10 to 15 years upon a burglary conviction; he was released on parole in August, 1972; in January 1976, he was arrested on a new burglary charge, and a parole detainer warrant was lodged against him; in May, 1976 he was sentenced, upon a plea of guilty to attempted burglary, to a term of two to four years, to run concurrently with his 1965 sentence, and, in June, 1977, he was afforded a final parole revocation hearing. The Appellate Division held that the delay of more than 41 months in granting a final parole revocation hearing to Majors, who had been incarcerated since his arrest in March, 1974, was prejudicial and a denial of his constitutional rights, and that the parole detainer warrant lodged against him must be dismissed with prejudice, and, upon the expiration of the sentence imposed in February, 1975, he would be entitled to be released to parole status. It held that the delay of nearly 17 months in granting a final parole revocation hearing to Smith, who had been incarcerated since his arrest in January, 1976, was prejudicial and a denial of his constitutional rights, and he was entitled to have the parole detainer warrant dismissed with prejudice so that, upon the expiration of his new sentence, he would be entitled to be released to parole status.

Matter of Piersma v Henderson, 60 AD2d 1001, affirmed.

Matter of Smith v Chairman of N.Y. State Bd. of Parole, 60 AD2d 775, affirmed.

HEADNOTE

Parole — Parole Revocation — Right to Prompt Hearing

Orders of the Appellate Division which dismissed parole detainer warrants because of delay in granting final parole revocation hearings to the parolees against whom the warrants were lodged are affirmed. It is of no significance for present purposes that the parolees in these cases were being held on new commitments rather than only on new arrest charges.

APPEARANCES OF COUNSEL

Louis J. Lefkowitz, Attorney-General (Frederick R. Walsh and *Jean M. Coon* of counsel, for appellants.

Amanda Potterfield and *Daniel J. Steinbock* for respondents.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division should be affirmed, without costs, in each case.

The parole detainer warrants were properly dismissed. (*People ex rel. Walsh v Vincent*, 40 NY2d 1049; *Matter of Beattie v New York State Bd. of Parole*, 39 NY2d 445.) It is of no significance for present purposes that the parolees in these cases were being held on new commitments rather than only on new arrest charges.

Chief Judge BREITEL and Judges GABRIELLI, JONES, WACHTLER and FUCHSBERG concur in memorandum; Judges JASEN and COOKE concur on constraint of *People ex rel. Walsh v Vincent* (40 NY2d 1049).

In each case: Order affirmed.

APPENDIX B

Decision of Appellate Division, Fourth Department, Supreme Court, State of New York (Smith)

10 In the Matter of Robert Smith, Appellant, v Chairman of the New York State Board of Parole et al., Respondents.—Judgment reversed and petition granted to the extent of dismissing parole detainer warrant. Memorandum: Petitioner, an inmate at Auburn Correctional Facility, appeals from a judgment in a habeas corpus proceeding, treated at Special Term as an article 78 proceeding, which directed respondent Parole Board to hold a parole revocation hearing within 60 days. On December 10, 1965 petitioner was sentenced to a maximum term of 15 years following a burglary in the first degree conviction. He was released on parole on August 18, 1972. While on parole, he was arrested in January, 1976 on a new burglary charge. A parole detainer warrant was lodged against him on February 8, 1976. He pleaded guilty to attempted burglary in the third degree and was sentenced to a two- to four-year term on May 12, 1976 to run concurrently with his previous 1965 sentence. Petitioner has been incarcerated since his arrest on January 24, 1976. Over 16 months elapsed from the lodging of the parole detainer warrant in February, 1976 until he was afforded a final parole revocation hearing has been granted, we have held that it is proper to dismiss the parole detainer warrant. However, since expiration date is later than the two- to four-year sentence imposed on May 12, 1976 which expires on January 21, 1980. Where a new sentence imposed has a longer duration than the old sentence which petitioner is serving on parole, and no prompt parole revocation hearing has been granted, we have held that is proper to dismiss the parole detainer warrant. However, since the new sentence controls, petitioner is not entitled to be released on parole status; rather, he must be remanded to the correctional facility (*Matter of Carter v New York State Dept. of Parole*, 58 AD2d 975, mot for lv to app den 42 NY2d 810; *People*

ex rel. England v New York State Bd. of Parole, 55 AD2d 1013). However, where a new sentence had been served and petitioner's confinement is solely under an old sentence for which he had not received a prompt parole revocation hearing, he is entitled to be restored to parole (*People ex rel. Walsh v Vincent*, 40 NY2d 1049; *Matter of Grix v Regan*, 57 AD2d 710; *People ex rel. Royster v Bombard*, 55 AD2d 940). In the instant case, the nearly 17-month delay in granting petitioner his final parole revocation hearing is plainly prejudicial and a denial of his constitutional rights (*Morrissey v Brewer*, 408 US 471; *Matter of Wright v Regan*, 46 AD2d 163). In this connection the dissent in voting to affirm relies, in part, on *Moody v Daggett* (429 US 78). We note, however, that in a case decided subsequent to *Moody v Daggett*, New York's highest court, nonetheless, requires a prompt final parole revocation hearing even though the violation of parole and resulting detention may have involved the commission of another crime (see *People ex rel. Walsh v Vincent*, 40 NY2d 1049, *supra*; *Matter of Beattie v New York State Bd. of Parole*, 39 NY2d 445). While petitioner's new sentence has not been fully served, it will terminate 13 months prior to the expiration of the old 1965 sentence. Hence, petitioner's continued incarceration, after his new shorter sentence ends, will be under the controlling old sentence for which he was not afforded a prompt parole revocation hearing. Accordingly, petitioner is entitled to have the parole detainer warrant dismissed with prejudice so that upon the expiration of his new sentence he will be entitled to be released to parole status. All concur, except Hancock, Jr., J., who dissents and votes to affirm the judgment, in the following memorandum: The question presented is whether a delay in affording a parole revocation hearing has deprived petitioner of his constitutional rights to due process under *Morrissey v Brewer* (408 US 471) when such delay has resulted neither in incarceration which might not otherwise have been imposed

upon the petitioner nor in the unavailability of witnesses or other sources of evidence. I see no reason why petitioner's rights to due process have been impaired, inasmuch as the revocation hearing on the old sentence has been held and the minimum period of his more recent sentence will not expire until May 12, 1978. Until that minimum has expired, petitioner would not be eligible to be released on parole under his new sentence. No prejudice from the delay in holding the parole revocation hearing has been shown, since his incarceration at least until May 12, 1978 derives not in any sense from the delay in granting the parole revocation hearing, but from the arrest and conviction on the new charges (see *Moody v Daggett*, 429 US 78, 86). Indeed it appears that the only basis for the parole revocation under the old sentence was the conviction for which he received the new sentence. The proof of this conviction was a matter of record and was uncontroverted. Under these circumstances, a prompt revocation hearing is not mandated (see *Moody v Daggett, supra; People ex. rel. Harrison v Smith*, 55 AD2d 1013; *People ex rel. Nance v New York State Bd. of Parole*, 53 AD2d 739; *Matter of Mullins v State Bd. of Parole*, 43 AD2d 382, app dsmd 35 NY2d 992). I agree with the reasoning of the court in *People ex rel. Nance v Board of Parole (supra*, pp 739, 740), "Petitioner received a hearing • • • at a time when he would still have been in jail serving his sentence on his second conviction. We have held that a prompt parole revocation hearing is not mandated where the parolee is already serving a sentence of imprisonment on a conviction for a new offense [citations omitted]. Petitioner was not prejudiced in any manner by the delay in conducting a hearing. The situation here differs from the situation where the parolee's delinquency is based on factual situations other than 'on conviction of another crime' *(Morrissey v Brewer, supra*, p 490). As we stated in *Matter of Mullins v State Bd. of Parole*

(supra, p 384) 'This rule would afford parolees a hearing whenever reasonably calculated to lead to their release and yet relieve the State from the considerable burden of conducting numerous hearings • • • when they would have no effect on the ultimate custody status of parolees.'" The cases on which petitioner relies to support his claim that a hearing "at this late date" would not "make him whole," are not in point. *People ex rel. Walsh v Vincent* (40 NY2d 1049), *People ex rel. Royster v Bombard* (55 AD2d 940), and *Matter of Wright v Regan* (46 AD2d 163) all involve prisoners whose minimum terms of their most recent sentences had already expired and who would be eligible for release under those sentences. Their continued incarceration could be said to have resulted from the failure to afford them hearings with respect to parole revocations from prior sentences. In *Matter of Grix v Regan* (57 AD2d 710) the petitioner's imprisonment continued after the expiration of his more recent sentence, even though no violation of parole had been charged against him with respect to his prior sentence; he was clearly entitled to be released on parole. For the foregoing reasons, the judgment should be affirmed. (Appeal from judgment of Cayuga Supreme Court—art 78.) Present—Cardamone, J.P., Simons, Dillon, Hancock, Jr., and Denman, JJ.

APPENDIX C

Decision of Appellate Division, Fourth Department, Supreme Court, State of New York (Piersma)

44 In the Matter of Joanne H. Piersma, on Behalf of Kenneth Majors, Relator v Robert J. Henderson, as Superintendent of the Auburn Correctional Facility, Respondent.—Judgment unanimously reversed and petition granted to the extent of dismissing parole detainer warrant. Memorandum: Petitioner, an inmate at a State correctional facility, appeals from a judgment dismissing his application for a writ of habeas corpus, which we now convert to an article 78 proceeding. On May 1, 1947 petitioner was sentenced to an indeterminate term of 20 to 40 years upon his conviction of arson, first degree. On October 14, 1971 he was released on parole and, while still under parole supervision, he was arrested on March 26, 1974 and charged with sexual abuse, first degree. A parole detainer warrant was lodged against him on March 27, 1974. Upon his plea of guilty to sexual abuse, first degree, he was sentenced on February 13, 1975 to an indeterminate term of two to four years to run concurrently with the time remaining on his 1947 sentence. Petitioner has been incarcerated since his arrest in March, 1974. He was not afforded a parole revocation hearing until October 13, 1977. A delay of more than 41 months in granting petitioner his final parole revocation hearing is prejudicial and a denial of his constitutional rights *(Morrissey v Brewer,* 408 US 471). In such circumstances the parole detainer warrant must be dismissed with prejudice and upon the expiration of the sentence imposed on February 13, 1975 he will be entitled to be released to parole status *(Matter of Smith v New York State Bd. of Parole,* 60 AD2d 775). (Appeal from judgment of Cayuga Supreme Court—art 78.) Present—Marsh, P.J., Cardamone, Dillon, Hancock, Jr., and Witmer, JJ.